(3)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 967

WILLIAM ELLIOTT,

Petitioner,

vs.

JESS BUCHANAN, WARDEN OF THE STATE PENITENTIARY AT EDDYVILLE, KENTUCKY, AND THE COMMONWEALTH OF KENTUCKY.

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

S. H. BROWN,
ZEB A. STEWART,
Counsel for Petitioner.

INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 967

WILLIAM ELLIOTT,

Petitioner,

vs.

JESS BUCHANAN, WARDEN OF THE STATE PENITENTIARY AT EDDYVILLE, KENTUCKY, AND THE COMMONWEALTH OF KENTUCKY.

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, William Elliott, respectfully shows:

A.

Summary Statement of the Matter Involved.

(1) Present status of the case.

Petitioner, William Elliott, is now confined in the State Penitentiary at Eddyville, Kentucky, under sentence of death for murder. Petitioner is charged with and convicted for the murder of one Joe Tuggle on the — day of October, 1940. At the time of the alleged slaying, petitioner was con-

fined in the Whitley County Jail at Williamsburg, Kentucky, and the slain man was a turnkey or deputy jailer. (*Elliott* v. *Commonwealth,* 290 Ky. p. 502, 161 S. W. (2d) p. 633). Judgment and sentence of death was imposed on petitioner on the 14th day of January, 1941 (R. 9). The petitioner appealed his case to the Kentucky Court of Appeals where it was affirmed, supra. The date of execution was set for the 3rd day of July, 1942. On the 24th day of June, 1942, petitioner filed a petition for a writ of error coram nobis in the Whitley Circuit Court and obtained a temporary injunction or restraining order from the Clerk of the Whitley Circuit Court directed to the respondent, Jess Buchanan, Warden of the Eddyville Penitentiary, enjoining and restraining him from carrying out the sentence of death. Counsel for petitioner gave notice that on the 20th day of June, 1942, he would go before the judge of the Whitley Circuit Court at Barbourville, Kentucky, which is in another county in that district, and move for a temporary injunction pending the trial on the merits of petition for writ of error coram nobis. Counsel for petitioner appeared in the Knox Circuit Court at Barbourville on the date specified in the notice and was there met by counsel for the commonwealth, who insisted upon an immediate trial of the case on its merits (R. 46-47). Counsel for petitioner announced that he was not ready for trial; that his witnesses were not present, that his client was not present (being in the death cell at Eddyville, three hundred miles away) and asked for time in which to prepare his case. The Judge of the Knox Circuit Court (the Honorable Flem D. Sampson) in the forenoon announced that he would not decide the case on a demurrer but beginning at one o'clock would decide the case on its merits (Statement of Judge Sampson R. 46-47). When 1 p. m. came, petitioner's counsel was forced into trial over his vigorous protests (See affidavits R. 9-29) and while the Judge had announced in the forenoon that he would not

decide the case on demurrer, the record discloses that he sustained the demurrer to petitioner's petition and while the Court of Appeals in its opinion (R. 55-65) said that petitioner had stated a cause of action, the matter stands now as having been decided on the Commonwealth's demurrer to petitioner's petition. Following the decision in the Whitley Circuit Court on the 30th day of June, 1942, just three days before the petitioner was scheduled to die, counsel for petitioner made several "stop gap" attempts to save petitioner's life pending the appeal from the decision of the Whitley Circuit Court. He was successful and these attempts may be reviewed later in the accompanying brief. The Court of Appeals affirmed the Whitley Circuit Court while criticizing it (R. 54). Petition for rehearing was overruled February 12, 1943. Stay of execution was granted pending the outcome of this proceeding.

The petition for writ of Error Coram Nobis contained a large number of allegations with reference to the way in which the original trial was conducted, at least two of which were not urged in the original appeal. The charges referred to alleged misconduct of the jury and the method in which the jury was selected, which petitioner says he did not and could not have known about on the original trial, and the giving of false and perjured testimony by a witness in the jail at the time of the shooting. Whether these or any of the allegations in the petition are true or are not true, we do not know and insist that the Knox Circuit Court did not know and the Court of Appeals of Kentucky does not know. They are certainly true on the record because admitted by the demurrer.

Petitioner had the right under the Kentucky law, as construed by the Court of Appeals, to apply for the writ of Error Coram Nobis for the reason that when Kentucky was admitted to the Union and became a Commonwealth, it retained certain rights, laws and remedies recognized by

Virginia. Petitioner, in his application for the writ of Error Coram Nobis and in his petition for rehearing, (a copy of which is filed in the record) seasonably and properly raised a Federal question by insisting that he was denied the equal protection and due process of law guaranteed by the 5th and 14th amendments to the Constitution of the United States. The Court of Appeals of Kentucky, in affirming both the appeal from the Whitely Circuit Court and from the Lyon Circuit Court and in denying petitioner a rehearing, ignored said Federal questions and refused to pass upon them. Therefore, your petitioner has exhausted his remedy in the state courts of the Commonwealth of Kentucky.

In support of the foregoing grounds of application, your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto. Petitioner further states that this application is not filed for the purposes of delay.

Wherefore, your petitioner prays that this court, pursuant to United States Judicial Code, Section 237b, as amended by Act of February 13, 1925, 43 Statute 937, issue a writ of Certiorari to review the judgment of the Court of Appeals of Kentucky in affirming the judgment of the Whitley Circuit Court in denying your petitioner a writ of Error Coram Nobis and in affirming the judgment of the Lyon Circuit Court in denying your petitioner a writ of Habeas Corpus.

All of which is respectfully submitted this 14th day of April, 1943.

WILLIAM ELLIOTT,
By S. H. BROWN,
Attorney at Law,
Frankfort, Kentucky.

Of Counsel:
ZEB A. STEWART,
Corbin, Kentucky.

PETITIONER'S BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 967

WILLIAM ELLIOTT,

Petitioner,

vs.

JESS BUCHANAN, WARDEN OF THE STATE PENITENTIARY AT EDDYVILLE, KENTUCKY, AND THE COMMONWEALTH OF KENTUCKY.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Court of Appeals of Kentucky has not been officially reported at the time of the preparation of this brief. A certified copy thereof is found in the Transcript of Record, pages 55-65.

II.

1.

Jurisdiction.

The statutory provision is United States Judicial Code, Section 237b, as amended February 13, 1925, 43 Stat. 937.

2.

The date of petition for rehearing was overruled on February 12, 1943 (R. 67).

3.

That the nature of the case and rulings below bring the case within the jurisdictional provisions of Section 237b supra, appears as following:

The petitioner herein specifically raised a Federal question as a ground for the reversal of the judgment of the Whitley Circuit Court, which Federal question was ignored and, in effect, denied by the Court of Appeals. Where conviction and sentence of death rest upon perjured testimony and the act of a fixed jury, such acts violate the 5th and 14th amendments to the Constitution of the United States in that it denies the petitioner his rights thereunder.

That he was denied due process of law and equal protection of law of the Commonwealth of Kentucky guaranteed by the 14th amendment to the Constitution of the United States in that:

(a) He was not given a fair, impartial and deliberate trial.

(b) That conviction of petitioner rests not only upon false testimony of perjured witnesses but on the act of fixed, partial and prejudiced jurors.

4.

The following cases, among others, sustain jurisdiction of the Court:

Strauder v. *W. Va.*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370; *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *State of Florida*, 309 U. S. 227; *Hysler* v. *Fla.*, 62 U. S. 688; *Pyle* v. *State of Kansas, et al.*, No. 50, 63 Supreme Court.

5.

Statement.

Petitioner was convicted of murdering one Joe Tuggle, turnkey or deputy jailer in Whitley County, Kentucky, and sentenced to die. He was represented by appointed counsel. After his conviction other counsel was employed by his relatives. Case was taken to the Court of Appeals (R. 56). Affirmed (R. 56). Petition for rehearing overruled (R. 56). Just prior to the date set for his execution—July 3, 1942—counsel filed a petition for writ of Error Coram Nobis in the Whitley Circuit Court. Obtained a temporary restraining order from the clerk of that court; gave notice that on the 30th day of June, 1942, he was to appear before the Honorable Flem D. Sampson, Judge of the Whitley Circuit Court in the thirty-fourth district, and moved for an injunction staying the execution of petitioner. A notice was given that the motion would be made at Barbourville, Knox County, Kentucky, which is some thirty miles from Williamsburg, county seat of Whitley County. When petitioner's counsel arrived at Barbourville on the morning of the 30th, the attorneys for the Commonwealth filed answer, demurrer and moved for an immediate dissolution of the restraining order. Counsel for petitioner moved for a continuance and in support of said motion filed affidavits (R. 43). The Circuit Judge, before whom the case was to be heard, was evidently hostile to petitioner (See statement of Judge Sampson (R. 46-47); overruled all of petitioner's motions and sustained the demurrer to the petition, denying petitioner the right to appeal. Petitioner was not even present. Counsel moved that he be allowed to be present but that motion was overruled. This hearing was had, as we have said above, on June 30th. Petitioner was to be executed on July 3rd. The then counsel for petitioner made several

desperate efforts to delay the execution and was finally successful. He then appealed the judgment of the Whitley Circuit Court, denying the writ of Error Coram Nobis and the judgment of the Lyon Circuit Court, denying his petition for writ of Habeas Corpus. Both of these judgments were affirmed by the Court of Appeals of Kentucky (R. 55-65). He then filed petition for Rehearing, raising specifically the Federal question referred to in petition for writ of certiorari. The Court of Appeals ignored these questions, refused to pass upon them and simply marked "overruled" on the record, making no further addition to the original opinion. Thereupon, petitioner filed a motion (R. 68) for a stay of execution pending his appeal to this Honorable Court.

We are not here arguing petitioner's guilt or innocence. With that, as we understand the ruling of this Court, we are not now concerned but this Court is concerned, if we read the books aright, for petitioner to have a fair and impartial trial. To that question we must confess we do not know the answer. We do not believe that the Whitley Circuit Court knows the answer or if it does, it is to the prejudice of this petitioner. We do not believe that the Court of Appeals of Kentucky knows the answer, since while criticizing the Whitley Circuit Court for its speed in rushing petitioner's counsel for trial in the absence of witnesses, in the absence of client and without the record, at the same time, affirmed the judgment of that court. Petitioner, in his petition for writ of Error Coram Nobis, made grave charges against the Whitley Circuit Court and the manner in which the original trial was conducted. Frankly, as to the truth of these charges, we have no information but the Commonwealth, by demurrer, admitted they were true. They may or may not be true. We cannot say. The Court of Appeals cannot say but the charges are there in the petition; admitted by demurrer and, certainly, petitioner should have

had an opportunity for a day in court in which to attempt at least to prove them.

Petitioner states that he was convicted on perjured evidence. Maybe so—maybe not. He should have been given an opportunity to show whether or not his allegations were true. Petitioner states that he was convicted by a fixed jury. Maybe he was—maybe he wasn't. He should have been given an opportunity to develop that fact.

The trial at Barbourville was a farce. Petitioner was not allowed to be present. His counsel was not allowed time in which to prepare to present his case. The Court of Appeals (R. 55-65) criticized this procedure and yet, strangely, it affirmed the case.

We insist that not only is every person entitled to a fair trial but that, furthermore, he is entitled to *feel and know* that he has had a fair trial.

We cite the case of *Anderson* v. *Buchanan,* 168 S. W. (2d) 48, in which the Court of Appeals completely reversed its former position on the writ of Error Coram Nobis and reviewed at length many cases theretofore holding to the contrary.

We insist that the above citation shows that the Court of Appeals of Kentucky has been on all sides of the question; that petitioner and his counsel had no way of knowing what to present or how to present it. We insist that petitioner was prevented by the Knox Circuit Court from fairly presenting his charge; that he had been convicted upon perjured and false testimony and that he had been convicted by a "rigged and fixed" jury. The judgment of the Court of Appeals, in effect, bears out this statement (R. 62-64) in that it criticizes the speed in which the Judge of the Knox Circuit Court forced petitioner's counsel into trial. As we have heretofore said, we do not know whether petitioner's allegations are true or not. Of his guilt we are not here

concerned. He is not on trial in this action. The court is on trial. He may be as guilty as Haaman. Perhaps he should have been executed but in a democracy, as said by our own Court of Appeals in the case of —— v. *Commonwealth,* "every man is entitled to one tolerably fair trial". The question here is whether or not petitioner has had one "tolerably" fair trial. We insist that under the record he has not and under the proceeding here, he has a right to have the question reviewed.

Conclusion.

Equal protection and due process of the law are the pillars on which our democracy rest. A denial of these to the humblest of our citizens is a threat to the liberties of all. Lives and liberties must be taken in accordance with those established modes of procedure which have been tried and tested by time. If the experience throughout the years has demonstrated that trial and convictions by honest testimony, openly arrived at, by fair and impartial jurors is better than and preferable to false and perjured testimony by fixed and rigged jurors, then it is respectfully submitted that the questions raised in this petition and brief call for the exercise by this Honorable Court of its supervisory powers to the end that rights guaranteed under the Constitution of the United States shall be preserved.

Respectfully submitted,

S. H. Brown,
Frankfort, Kentucky;
Zeb A. Stewart,
Corbin, Kentucky,
Attys. for Petitioner.